RECORD
AND
BRIEFS

Supreme Court, U.S.
FILED
MAR - 1 2017
OFFICE OF THE CLERK

No. 16-341

IN THE

Supreme Court of the United States

TC HEARTLAND LLC,

Petitioner,

v.

KRAFT FOODS GROUP BRANDS LLC,

Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Federal Circuit

BRIEF FOR THE RESPONDENT

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March 1, 2017

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QUESTION PRESENTED

The Court granted certiorari on the following question:

Whether 28 U.S.C. § 1400(b) is the sole and exclusive provision governing venue in patent infringement actions and is not to be supplemented by 28 U.S.C. § 1391(c).

RULE 29.6 STATEMENT

Kraft Heinz Foods Co. is the parent company of Kraft Foods Group Brands LLC. Kraft Heinz Foods Co. is indirectly wholly owned by The Kraft Heinz Company, a publicly traded company. Berkshire Hathaway, Inc., a publicly traded company, beneficially owns more than 10% of the outstanding common stock of The Kraft Heinz Company.

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BRIEF FOR THE RESPONDENT

The question presented is answered by a statute adopted in 2011 that petitioner TC Heartland LLC ("Heartland") barely acknowledges. In 2011, Congress adopted revised definitions of residence that apply "[f]or all venue purposes." 28 U.S.C. § 1391(c). The undefined term "resides" or "residence" appears in venue statutes throughout the United States Code, and the lack of a statutory definition had left courts struggling to ascertain the residence of an individual, an unincorporated business, or a corporate plaintiff. The definitions adopted in 2011 answered all of those questions, for *all* venue statutes. And Heartland no longer disputes that under the 2011 definition, it resides in Delaware, where this suit was brought.

Instead, Heartland contends that Congress meant to leave patent-infringement cases out—that Congress meant to define "residence" for all venue purposes *except* patent-venue purposes. The text, history, and structure of the venue statutes all refute that argument. Ultimately Heartland and its amici are just arguing that, as a policy matter, corporations should enjoy a dramatically broader venue privilege in patent-infringement cases than they enjoy in other cases. That argument should be addressed to Congress, which has been actively considering detailed proposals to change patent venue. Notably, all of those proposals are more nuanced than Heartland's, which in many cases would allow even a multinational corporation to insist on being sued in *one* specific district.

STATEMENT

A. Statutory Background

Three statutory provisions are relevant to whether venue over this case is proper in Delaware. One provision specifies that venue in a patent-infringement case is proper where the defendant "resides." The second defines "residence" "[f]or all venue purposes." The third defines "venue." The current provisions were adopted in 2011 (although Heartland focuses on previous versions).

1. Venue is "the geographic specification of the proper court or courts for the litigation" of a particular case. 28 U.S.C. § 1390(a). In contrast to personal jurisdiction, which "goes to the court's power to exercise control over the parties," venue is "primarily a matter of choosing a convenient forum." *Leroy v. Great W. United Corp.*, 443 U.S. 173, 180 (1979). Venue in the federal courts has been governed by statute since 1789.

The Judiciary Act of 1789 provided that venue in federal civil cases was proper where the defendant was "an inhabitant" or wherever the defendant could be "found" for service of process. Act of Sept. 24, 1789, ch. 20, § 11, 1 Stat. 73. In 1887, Congress eliminated the latter provision, leaving plaintiffs in federal-question cases with one venue option: the judicial district "inhabit[ed]" by the defendant. Act of Mar. 3, 1887, ch. 373, § 1, 24 Stat. 552. Corporate defendants were deemed to "inhabit" only the state of their incorporation. *See Shaw v. Quincy Mining Co.*, 145 U.S. 444, 448 (1892).

Relying on dicta in *In re Hohorst*, 150 U.S. 653 (1893), several lower courts held that the 1887 Act did not apply to cases entrusted to exclusive federal jurisdiction, such as patent-infringement cases. *See, e.g.*, *Earl v. Southern Pac. Co.*, 75 F. 609, 611 (9th Cir. 1896). Under that interpretation, valid service alone was sufficient to establish venue. *Ibid.* Congress "responded promptly" by enacting a specialized patent venue statute in 1897. *Brunette Machine Works, Ltd. v. Kockum Industries, Inc.*, 406 U.S. 706, 712 (1972). The new statute rejected the service-based standard of venue, but still provided patent-infringement plaintiffs with "an advantage" over plaintiffs in other federal-question cases. *Id.* at 713 n.13. Specifically, the 1897 Act allowed patent owners to file suit in either (1) a district of which the defendant was "an inhabitant," or (2) a district in which the defendant maintained a "regular and established place of business" *and* committed acts of infringement. Act of Mar. 3, 1897, ch. 395, 29 Stat. 695.

2. In 1948, as part of the revision of the Judicial Code, Congress recodified the special patent venue statute as 28 U.S.C. § 1400(b). That provision read (and still reads): "Any civil action for patent infringement may be brought in the judicial district [1] where the defendant resides, or [2] where the defendant has committed acts of infringement and has a regular and established place of business." 28 U.S.C. § 1400(b) (1952).

As part of the same revision, Congress codified the general venue rules into a new statute, *see* 28 U.S.C. § 1391(a), (b) (1952), while also adding a provision to

govern venue in cases against corporate defendants, *id.* § 1391(c). The new Section 1391(c) provided:

> (c) A corporation may be sued in any judicial district in which it is incorporated or licensed to do business or is doing business, and such judicial district shall be regarded as the residence of such corporation for venue purposes.

Ibid. In the first clause of this subsection, Congress provided a substantive venue rule, establishing that corporations could be sued not only in their state of incorporation, but also in any judicial district in which they were "licensed to do business" or were "doing business." *Ibid.* In the second clause, Congress stipulated that any judicial district that satisfied these criteria would be the corporation's "residence." *Ibid.*

After 1948, lower courts divided over whether to apply Section 1391(c) to determine "residence" in patent-infringement cases. This Court resolved the split in *Fourco Glass Co. v. Transmirra Prods. Corp.*, 353 U.S. 222 (1957), holding that Section 1391(c) did not "supplement[]" the venue options provided by Section 1400(b). *Id.* at 229. In reaching that conclusion, the Court relied on legislative history indicating that Congress had not intended to make any "substantive change[s]" through the 1948 recodification that were not "explained in detail in the Revisers' Notes." *Id.* at 226-27. Because the Revisers' Notes did not mention any change to patent venue, the Court held that no change should be recognized. *Id.* at 228.

3. In 1988, Congress revised Section 1391(c). *See* Judicial Improvements and Access to Justice Act of

1988 ("1988 Act"), Pub. L. No. 100-702, § 1013, 102 Stat. 4642. Following the 1988 amendments, the first sentence of Section 1391(c) read as follows:

> (c) For purposes of venue under this chapter, a defendant that is a corporation shall be deemed to reside in any judicial district in which it is subject to personal jurisdiction at the time the action is commenced.

28 U.S.C. § 1391(c) (1988). This amendment altered Section 1391(c) in three ways. *First*, Section 1391(c) became a purely definitional provision that no longer contained any substantive venue rules specifying where corporations "may be sued." *Second*, the definition became broader: a corporate defendant became a resident of "any judicial district in which it is subject to personal jurisdiction," rather than any district in which it was "doing business." *Ibid.* *Third*, Congress applied this broader definition of corporate residence "[f]or purposes of venue under this chapter" (*i.e.*, Chapter 87 of Title 28, "District Courts; Venue"), which includes Section 1400(b). *Ibid.*

In 1990, the Federal Circuit held that the revised Section 1391(c) defined the "residence" of a corporate defendant for purposes of Section 1400(b), since the latter provision is part of Chapter 87 of Title 28. *See VE Holding Corp. v. Johnson Gas Appliance Co.*, 917 F.2d 1574, 1582 (Fed. Cir. 1990). The court of appeals reasoned that its holding was consistent with *Fourco* because, in contrast to the first clause of the old Section 1391(c), the 1988 version of Section 1391(c) did not purport to "establish[] a patent venue rule separate and apart from that provided under § 1400(b)." *Id.* at 1580. Rather, it "only operate[d] to

define a term in § 1400(b)" that was nowhere defined in Section 1400(b) itself. *Ibid.*

5. In 2011, Congress made its most significant revision to the venue statutes, including adopting the text operative here. The Federal Courts Jurisdiction and Venue Clarification Act of 2011, Pub. L. No. 112-63, 125 Stat. 758 (2011) ("Venue Clarification Act" or "2011 Act"),[1] emerged from a years-long reform project spearheaded by the American Law Institute ("ALI"). *See* ALI, *Federal Judicial Code Revision Project* (2003) ("ALI Project"). Congress based the law it ultimately enacted on the ALI Project, after the proposal was further vetted by the Judicial Conference's Committee on Federal-State Jurisdiction, academics, and numerous bar and trade associations. H.R. Rep. No. 112-10, at 1-3 (2011) ("House Report"). As the House Judiciary Committee explained, the revision was intended to "bring[] more clarity" to both jurisdiction and venue law. *Id.* at 1.

The Venue Clarification Act restructured venue law in several significant ways. Most important here, Congress substantially revised Section 1391(c) to provide a comprehensive definition of "residence" "[f]or all venue purposes." The new definitional subsection now reads:

> (c) RESIDENCY.—*For all venue purposes*—
>
> (1) a natural person, including an alien lawfully admitted for permanent residence in the United States, shall be deemed to reside in

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[1] Heartland refers to this statute as the "Federal Courts Jurisdiction and Clarification Act of 2011" (Heartland Br. 13)—dropping the key word "Venue" from the statute's title.

> the judicial district in which that person is domiciled;
>
> (2) an entity with the capacity to sue and be sued in its common name under applicable law, whether or not incorporated, shall be deemed to reside, if a defendant, in any judicial district in which such defendant is subject to the court's personal jurisdiction with respect to the civil action in question and, if a plaintiff, only in the judicial district in which it maintains its principal place of business; and
>
> (3) a defendant not resident in the United States may be sued in any judicial district, and the joinder of such a defendant shall be disregarded in determining where the action may be brought with respect to other defendants.

28 U.S.C. § 1391(c) (emphasis added). Congress also defined "venue" in a new provision, 28 U.S.C. § 1390(a), which specifies that "the term 'venue' refers to the geographic specification of the proper court or courts for the litigation of a civil action," and does not refer to statutes granting subject-matter jurisdiction only to a particular court.[2]

Thus, current Section 1391(c)(2) harmonizes the treatment of incorporated and unincorporated entities by extending the jurisdiction-based definition of "residence" to both types of defendants. Section 1391(c)(1), in turn, defines the residence of natural persons. And Section 1391(c)(3) provides a rule for

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[2] Section 1390(b) also carves out admiralty cases as an exception to the general venue rules.

defendants that do not reside in the United States, replacing former Section 1391(d), which had provided that "[a]n alien may be sued in any district," 28 U.S.C. § 1391(d) (2006). By its plain language, Section 1391(c) now governs "[f]or all venue purposes." As explained in the House Report, the new Section 1391(c) "appl[ies] to all venue[]statutes, including venue provisions that appear elsewhere in the United States Code," in contrast to old Section 1391(c), "which applie[d] only to corporations as defendants, and only for purposes of venue under Chapter 87." House Report 20.

B. Proceedings Below

A unit of Kraft Foods pioneered "liquid water enhancers" ("LWEs"), which are flavored beverage mixes that come packaged in convenient pocket-sized containers designed for use "on-the-go." Kraft Foods introduced the highly popular "MiO" brand in 2011, and in less than two years, the market for LWEs grew to be worth almost half a billion dollars. Shaun Weston, *Liquid Water Enhancers Market Grows 85%*, FoodBev Media (Feb. 20, 2014), http://www.foodbev.com/news/liquid-water-enhancers-market-grows-85. Kraft Foods' LWE innovations have resulted in several patents, which are held by respondent Kraft Food Group Brands LLC ("Kraft").

Heartland is a competitor in the market for LWEs. Kraft sued Heartland for patent infringement in the U.S. District Court for the District of Delaware. The complaint alleges that Heartland's manufacture and sale of LWEs infringes U.S. Patent No. 8,603,557,

which covers Kraft's LWE technology.[3] J.A. 14a-15a. Kraft is organized under Delaware law. J.A. 11a. Heartland is a limited liability company ("LLC") organized under Indiana law. J.A. 22a.[4] It ships accused products directly to Delaware, among other places. Those Delaware shipments resulted in more than $331,000 in sales revenue in a single year. Pet. App. 9a, 19a, 26a.

1. Heartland moved to dismiss Kraft's complaint in part and to transfer the case to the Southern District of Indiana. J.A. 27a. Heartland's lead defense was lack of personal jurisdiction, which is not at issue in this Court.

As to transfer, Heartland argued that Section 1400(b) did not authorize venue in the District of Delaware. J.A. 39a-40a. Heartland asserted that Congress had overturned the Federal Circuit's decision in *VE Holding* in 2011, and that under the new statute, Heartland resided *only* in Indiana. Because Heartland has no facilities (and thus no "regular and established place of business") in Delaware, Heart-

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[3] The complaint also alleged infringement of two other patents owned by Kraft. J.A. 13a-14a. Kraft is no longer asserting those patents in the case.

[4] The complaint alleged, apparently inaccurately, that TC Heartland *LLC* was a "corporation organized and existing under the laws of the State of Indiana." J.A. 11a. Heartland admitted this allegation in its answer, *see* J.A. 60a, and repeatedly described itself in court papers as a "corporation" "incorporated" in Indiana. J.A. 51a, 52a ("Heartland is an Indiana corporation"). But Heartland also described itself as an LLC, which appears to be the accurate characterization. J.A. 22a, 29a; *accord* Heartland Br. 16.

The complaint also named Heartland Packaging Corporation as a co-defendant. J.A. 10a. Heartland's CEO represented, however, that that corporation is defunct. J.A. 22a.

land argued that the only place it was subject to suit under Section 1400(b) was the Southern District of Indiana. J.A. 46a-47a.

2. The Magistrate Judge recommended denying Heartland's motions in full. Pet. App. 18a-54a.

Beginning with personal jurisdiction, the Magistrate Judge reasoned that Heartland had "minimum contacts" with Delaware, "sufficient to establish specific jurisdiction as to sales of [the accused] product." Pet. App. 29a-32a (quoting *Beverly Hills Fan Co. v. Royal Sovereign Corp.*, 21 F.3d 1558, 1568 & n.21 (Fed. Cir. 1994)). The Magistrate Judge rejected Heartland's argument that this Court's intervening decisions, including *Walden v. Fiore*, 134 S. Ct. 1115 (2014), "overruled" this precedent. Pet. App. 32a-33a.

Turning to venue, the Magistrate Judge concluded that "Section 1391(c) continues to operate to define 'resides' in Section 1400(b), as was set out in *VE Holding*." Pet. App. 41a. Therefore, because Heartland was subject to personal jurisdiction in Delaware, venue was proper in Delaware as well. The Magistrate Judge also recommended denying Heartland's Section 1404(a) motion to transfer, which he noted Heartland had only raised "in a cursory fashion." Pet. App. 42a-53a.

The District Court adopted the Magistrate Judge's report in full. Pet. App. 15a-16a.

3. Heartland sought a writ of mandamus from the Federal Circuit, which unanimously denied the petition. Pet. App. 1a-12a.

The Federal Circuit reaffirmed that Section 1391(c) supplies the definition of Heartland's "residence" for

venue purposes. The court observed that the 2011 change in the introductory clause of Section 1391(c) from "[f]or purposes of venue under this chapter" to "[f]or all venue purposes" reflected "a broadening of the applicability of the definition of corporate residence, not a narrowing." Pet. App. 5a. And the court rejected as meritless Heartland's contention that the 2011 Act somehow effectively reinstated *Fourco*'s construction of "the patent venue statute that was in effect prior to the 1988 amendments." *Id.* at 5a-6a.

The Federal Circuit agreed with the District Court's analysis as to personal jurisdiction and held that Heartland's jurisdictional theory was "foreclosed" by circuit precedent. Pet. App. 10a.

4. The parties have continued to litigate this case in the District of Delaware while Heartland pursued relief from the Federal Circuit and then this Court. The case is currently set for trial in October 2017.

SUMMARY OF ARGUMENT

Congress has answered the question presented in unequivocal terms. Following a major revision of venue law in 2011, Section 1391(c)(1)-(3) provides comprehensive definitions of "residence" that apply "[f]or all venue purposes." In light of the statutory definition of "venue," "venue purposes" clearly include the patent-venue statute, Section 1400(b). Applying Section 1391(c)'s definitions of residence to Section 1400(b), Heartland "resides" in any judicial district in which it is subject to personal jurisdiction. This suit therefore was properly filed in Delaware. Neither *Fourco*'s interpretation of statutes that have since been amended, nor the policy arguments put forward by Heartland and its amici, provide any ba-

sis to depart from the unambiguous statutory definition.

I. The statutory text decides this case. Section 1400(b) governs venue in patent-infringement cases, and it specifies that an action may be brought in any judicial district in which, *inter alia*, the defendant "resides." Section 1400(b) does not define "resides," but Section 1391(c) provides definitions—for individuals, corporations, and unincorporated associations—that apply "[f]or *all* venue purposes." 28 U.S.C. § 1391(c) (emphasis added). And another definitional provision, 28 U.S.C. § 1390(a), makes clear that Section 1400(b) is a "venue" statute for purposes of Section 1391(c).

The legislative history confirms what the plain language clearly says: Section 1391(c)'s definitions of "residence" apply to all venue statutes, including patent venue. Those definitions are the product of a major effort to simplify and clarify venue law led by the ALI, which culminated in 2011 when Congress enacted the Venue Clarification Act. The statutory history shows that the drafters of the 2011 Act intended Section 1391(c) to provide global definitions for "residence" in order to resolve several conflicts over how to apply that term, under both general and specialized venue statutes. Moreover, the drafters were aware of judicial precedent concerning patent venue, and they intended to apply Section 1391(c)'s definitions of "residence" to Section 1400(b).

Heartland's contrary interpretation conflicts with the statutory structure and would sow confusion. *First*, Heartland's approach would mean that, in some cases, patent owners could not sue foreign companies for patent infringement *anywhere*. In

Brunette, this Court held that former Section 1391(d), which prevented alien defendants from raising venue objections, applied to patent-infringement actions governed by Section 1400(b). 406 U.S. at 714. But in 2011 Congress revised Section 1391(d) and made it part of Section 1391(c), which Heartland insists does not apply in patent-infringement cases. Heartland's view would therefore overturn *Brunette* and leave no district where a foreign defendant "resides." *Second*, Heartland's interpretation would create inconsistent definitions of "residence" for corporations and unincorporated business entities, such as LLCs and partnerships. Congress adopted a common definition for all of these entities in Section 1391(c)(2). But if Section 1391(c) did not apply, then the residence of unincorporated associations would be controlled by the "doing business" standard this Court adopted in *Denver & Rio Grande W. R.R. v. Brotherhood of R.R. Trainmen*, 387 U.S. 556, 562 (1967), not by *Fourco*. Simply adhering to the plain text of the definitional statute avoids the major structural inconsistencies that Heartland's position would create.

II. This Court's *Fourco* decision does not support Heartland's argument. In *Fourco*, this Court held that an earlier version of Section 1391(c) did not apply to actions governed by Section 1400(b). The Court's conclusion was driven by the legislative history of the 1948 recodification of Title 28, which allowed the Court to conclude that the 1948 amendment did not substantively affect patent-infringement cases. The Venue Clarification Act, by contrast, plainly *did* substantively revise venue law, in several material ways. It turned Section 1391(c) into a comprehensive set of definitions that apply

"[f]or all venue purposes," and it defined "venue" in Section 1390(a). Congress thus spoke clearly about the scope of Section 1391(c)'s application, and this Court should effectuate that judgment. Congress was not required to state expressly that it was abrogating *Fourco* when it adopted new statutory language that unambiguously does exactly that.

Heartland largely ignores the Venue Clarification Act and the operative statutory text, choosing instead to focus on critiquing the Federal Circuit's earlier *VE Holding* decision, which examined the earlier 1988 amendment to Section 1391(c). But *VE Holding* obviously did not have the benefit of the unambiguous language of the 2011 Act. It is the *current* statute, not a *past* Federal Circuit decision, that is now before the Court.

III. The policy objections that Heartland and its amici raise do not justify disregarding the statutory text and, in any event, fail on their own terms, because the restrictive and outdated definition of residence that Heartland defends would cause more problems than it solves. Heartland's definition would deem each corporation to reside in only *one* jurisdiction, the state of incorporation. That would heighten, not reduce, the concentration of patent-infringement cases in a handful of judicial districts—primarily the districts where most companies are incorporated, such as the District of Delaware. Heartland's definition would also bizarrely lead to cases in which a patent owner could not sue an infringer at the infringer's own principal place of business. And it would impose significant burdens on patent owners in the common scenario where there are multiple

accused infringers, as there would often be no single venue in which all of the defendants could be sued.

These disruptions to venue law are unnecessary, because courts can address concerns about forum-shopping by enforcing personal-jurisdiction requirements and by transferring cases between districts under 28 U.S.C. § 1404(a). Moreover, Congress is far better positioned to reform venue appropriately. The only options for this Court are to apply Section 1391(c)'s definition of "residence" or to revive the place-of-incorporation approach that is widely considered too restrictive. By contrast, Congress can develop a venue rule that limits forum-shopping without also impairing the ability of operating companies to enforce their patent rights in an appropriate district.

ARGUMENT

Instead of addressing the statutory text that is in force *today*, Heartland contends that the outcome of this case is controlled by a 60-year old decision interpreting venue statutes that have since been amended twice over. But "[t]he starting point in discerning congressional intent is the existing statutory text, and not the predecessor statutes." *Lamie v. United States Trustee*, 540 U.S. 526, 534 (2004). The existing statutory text is clear: Congress has expressly defined "residence" "[f]or all venue purposes." And it has defined "venue" to include the patent venue statute. Congress's definition of "residence" therefore is the controlling one. Under that definition, Heartland resides in the District of Delaware. The Court of Appeals' judgment should be affirmed.

I. Congress Has Expressly Defined Where A Defendant "Resides" For All Venue Purposes.

"In statutory construction," the Court always "begin[s] with the language of the statute." *Kingdomware Techs., Inc. v. United States*, 136 S. Ct. 1969, 1976 (2016) (quotation marks omitted). In this case, the Court should also end there. The text clearly establishes that Section 1391(c)'s definition of "residence" applies "[f]or all venue purposes." And a separate definition confirms what is already self-evident—that "all venue purposes" include *patent*-venue purposes.

A. Section 1391(c)'s Definition Of Residence Applies "For All Venue Purposes," Which Include 28 U.S.C. § 1400(b).

Venue in patent-infringement cases is governed by 28 U.S.C. § 1400(b), which provides:

> Any civil action for patent infringement may be brought in the judicial district where the defendant resides, or where the defendant has committed acts of infringement and has a regular and established place of business.

Section 1400(b) is one of many venue statutes, both in Title 28 and outside it, that use the term "resides" or "residence" without further defining it.[5]

Section 1391(c), in turn, defines "[r]esidence" "[f]or all venue purposes." 28 U.S.C. § 1391(c). Paragraphs (1)-(3) explain how to ascertain the residence

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[5] *See, e.g.*, 28 U.S.C. §§ 1396, 1397, 1398, 1402; 15 U.S.C. §§ 15, 15a; 18 U.S.C. § 1965(a).

of, respectively: (1) natural persons; (2) corporations, LLCs, and other artificial entities with the capacity to sue or be sued; and (3) non-residents of the United States. *Ibid.*

"Statutory definitions control the meaning of statutory words . . . in the usual case." *Burgess v. United States*, 553 U.S. 124, 129 (2008) (citation omitted; alteration in original). Indeed, where a term has "a defined meaning," "the definition is virtually conclusive." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 228 (2012). The question presented here thus turns on whether the definitions in Section 1391(c) control the meaning of the term "resides" in the patent-venue statute, just as they do in all other venue statutes that use that term. The unambiguous answer is "yes."

The text of Section 1391(c) sweeps broadly, extending to "*all* venue purposes." 28 U.S.C. § 1391(c) (emphasis added). In using the term "all," Congress chose language that is "clear, broad, and unqualified." *Norfolk & Western Ry. Co. v. Am. Train Dispatchers Ass'n*, 499 U.S. 117, 127 (1991) (interpreting the phrase "all other law"); *accord Vadnais v. Federal Nat'l Mortgage*, 754 F.3d 524, 526 (8th Cir. 2014) ("'[A]ll' means all." (citation omitted)).

Congress also defined what counts as a "venue purpose[]." Under Section 1390(a) ("Venue Defined"), "the term 'venue' refers"—for purposes of the statutory chapter that includes Sections 1391(c) and 1400(b)—"to the geographic specification of the proper court or courts for the litigation of a civil action that is within the subject-matter jurisdiction of the district courts in general." 28 U.S.C. § 1390(a). By contrast, "venue" "does not refer to any grant or re-

striction of subject-matter jurisdiction providing for a civil action to be adjudicated only by the district court for a particular district or districts." *Ibid.*

Section 1400(b) has a "venue purpose" under Section 1390(a)'s definition: actions for patent infringement are "civil actions," and Section 1400(b) does not restrict subject-matter jurisdiction. Accordingly, because Section 1391(c)'s definitions of "residence" apply for "all venue purposes," those definitions supply the meaning of the term "resides" as used in Section 1400(b). It really is that simple.

B. Congress Adopted The Current Definition Of "Residence" As Part Of A Carefully Calibrated Package Of Reforms In The Venue Clarification Act.

When, as here, the "words of the statute are unambiguous, the judicial inquiry is complete." *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 98 (2003) (quotation marks omitted). Nevertheless, the history of the Venue Clarification Act, which adopted the current version of Section 1391(c) and added Section 1390(a)'s definition of venue, confirms what the plain text makes clear: Section 1391(c)'s definitions of "residence" apply globally to *all* venue statutes, including Section 1400(b).

1. As noted, p. 6, *supra*, Congress based the 2011 Act on the ALI's proposal for venue reform. *See* House Report 1-3. One of the ALI Project's recommendations, which Congress adopted, was to modify and expand Section 1391(c) in order to provide uniform definitions of "residence" that would apply to venue statutes throughout the U.S. Code. The new version of Section 1391(c) was intended to be "sweep-

ing," because it "comprehensively defines residence for purposes of party-based venue." ALI Project 177-78. The legislative history confirms that Section 1391(c)'s definitions "would apply to *all* venue[] statutes," "*[u]niversally*," and mentions no exception. House Report 20 (first emphasis added).

By using an all-purpose definition for "residence," the ALI Reporters (and ultimately Congress) were able to clarify venue law without undertaking the "challenging, delicate, and indeed agonizing" process of amending or repealing more than 200 specialized venue statutes. ALI Project 168; *see* House Report 18 n.8. The new, cross-cutting definitions resolved several points of confusion under existing venue statutes. For example:

- *Natural persons.* Section 1391(c)(1) resolved a "longstanding split" over the meaning of "residence" for natural persons. Courts had divided over whether residence meant only an individual's "domicile" rather than a more transitory address. ALI Project 178; *see also* House Report 20-21. Section 1391(c)(1) adopted the "domicile" approach.

- *Unincorporated associations.* Section 1391(c)(2) resolved a "division in authority" concerning the residence of unincorporated associations, such as LLCs. House Report 21. In *Denver & Rio Grande Western R.R. v. Brotherhood of R.R. Trainmen*, 387 U.S. 556 (1967), this Court held that an unincorporated association resides for venue purposes in any district in which it is doing business, *id.* at 562. The Court reached that decision by analogy to the definition of residence that then applied to corporations. *Ibid.*

After Congress broadened the definition of corporate residence, courts split over whether the change implicitly expanded the definition for unincorporated associations as well. House Report 21. ALI's proposal, which Congress adopted, "end[ed] this actual and potential confusion" by adopting a single definition of residence for corporations and unincorporated entities. ALI Project 191.

- *Non-U.S. residents.* Before the 2011 Act, "aliens"—including lawful permanent residents of the United States—had no venue defense because, under former Section 1391(d), they could be sued in any district. *See Brunette*, 406 U.S. at 708. That was just as true for patent venue as for all other venue statutes, as this Court held in *Brunette*. *Id.* at 714. The ALI Project proposed, and Congress adopted, amendments retaining the principle that overseas defendants have no venue defense, but changing the focus from *citizenship* to *residence*. *See* House Report 22-23; ALI Project 199-201. Under the new statute, only defendants that do not "reside[]" in the United States, as that term is defined in the preceding two paragraphs, are subject to suit in any judicial district. 28 U.S.C. § 1391(c)(3). Lawful permanent residents, like other natural persons, now "reside" in the district in which they are domiciled. *Id.* § 1391(c)(1).

In adopting this new, comprehensive definition of "residence," the ALI Project explained that Section 1391(c) would govern the use of that term in all specialized venue statutes, both within and outside

Chapter 87 of Title 28. *Accord* House Report 20. The ALI Project noted that its proposal would not *displace* specialized venue statutes—a point that Section 1391(a)'s introductory phrase "except as otherwise provided by law" made clear. ALI Project 167-68. But the ALI Project explained that "the definitions of residence set forth in new § 1391(c)" were to "apply *globally* to *all* venue statutes, whether of general or special applicability, that use the residence of the parties as the criterion for . . . venue." *Id.* at 188-89 (emphasis added). This result "follows," the ALI Project explained, directly from the language used by the new statute, *i.e.*, from "the introductory phrase of new § 1391(c) that makes the definitions that follow applicable '[f]or all venue purposes.'" *Id.* at 189. Indeed, the purpose of the project would have been frustrated if the definitions did not apply to specialized venue statutes, as the circuit conflicts over how to apply the undefined term "residence" extended to specialized venue statutes.[6]

2. The ALI Reporters also addressed the implications of their proposal for patent venue under Section 1400(b). Their attention to this particular issue, including their endorsement of the Federal Circuit's *VE Holding* decision, confirms that the new Section 1391(c) was intended to mean what it says: "all venue purposes" means "all venue purposes"—not "all venue purposes *except* for patent venue," as Heartland would read it.

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[6] *See, e.g.*, *Penrod Drilling Co. v. Johnson*, 414 F.2d 1217, 1220 (5th Cir. 1969) (venue over unincorporated associations for purposes of Jones Act); John B. Oakley, *Prospectus for the American Law Institute's Federal Judicial Code Revision Project*, 31 U.C. Davis L. Rev. 855, 956 n.437 (1998) (citing *Penrod*).

The 1998 Prospectus to the ALI Project identified several "problems under subsection 1400(b)" that the project could address, including issues created by Section 1400(b)'s use of "residency requirements at odds with the general statute." John B. Oakley, *Prospectus for the American Law Institute's Federal Judicial Code Revision Project*, 31 U.C. Davis L. Rev. 855, 964-66 (1998) ("ALI Prospectus"); *see also* House Report 20 n.11 (referencing the ALI Prospectus). The Prospectus specifically noted and embraced *VE Holding*, observing that the Federal Circuit's decision "harmonized subsection 1400(b)'s corporate residency requirements with subsection 1391(c)'s requirements," though it noted that "individuals and unincorporated associations" were not yet subject to the same rule. ALI Prospectus 966.

Similarly, the ALI Project referred to *VE Holding* as a "palliative opinion" that mitigated the consequences of an outdated approach to patent venue. ALI Project 214-15. The ALI Project recognized, however, that *VE Holding* was only a "partial palliative," because it did not apply to "suits against unincorporated entities and natural persons." *Ibid.* This problem would be addressed through the revisions to Section 1391(c), which defined residence for natural persons and adopted a common definition for unincorporated associations and corporations. 28 U.S.C. § 1391(c)(1), (2).[7]

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[7] The ALI Project recommended taking the further step of repealing Section 1400 (concerning both copyright and patent venue) because the Reporters did not believe these specialized venue statutes continued to serve a useful purpose. *See* ALI Project 212. That proposal was not adopted, but the new, generally applicable Section 1391(c) definition was enacted. As a

C. Heartland's Reading Of Section 1391 Ignores Statutory Structure And Undermines The Purposes Of The Venue Clarification Act.

Heartland contends (at 19-20, 24-26) that Section 1391(c)'s definition of "residence" for "all venue purposes" does not apply to one particular venue purpose: patent venue. Indeed, from its question presented—whether the patent-venue statute "is not to be supplemented by [Section] 1391(c)," Pet. i—Heartland appears to be arguing that *no* part of Section 1391(c)'s definitions can apply in a patent case. That approach finds no basis in the statutory text, would undo a holding of this Court, and would undermine Congress's attempt to resolve several difficult venue questions comprehensively.

1. Heartland's insistence that Section 1400(b) "is not to be supplemented by 28 U.S.C. § 1391(c)," Pet. i, ignores this Court's holding in *Brunette*. For the entire history of the Republic, Congress has withheld the venue privilege from foreign defendants, because there is no particular federal judicial district where litigation against them belongs. This Court held in *Brunette* that the relevant statute applies *even in patent-infringement cases*. Yet the statute governing suits against foreign defendants is itself now part of Section 1391(c), where it also applies "[f]or all venue purposes." Heartland appears to concede (at 36 n.13) that at least some version of the foreign-defendant rule applies in patent-infringement cases—a wise concession, because if it did not, patent-infringement

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result, Section 1400(b) remains somewhat more restrictive than the general venue statute. *See* p. 34, *infra*.

suits against many foreign defendants would be *literally impossible*.[8] But as a matter of statutory construction, if the foreign-defendant rule in Section 1391(c)(3) applies, so does the rest of Section 1391(c), including the portion that Heartland resists.

a. In *Brunette*, this Court addressed whether the foreign-defendant statute, then codified at Section 1391(d), "govern[ed] the venue of an action for patent infringement against an alien defendant," a Canadian corporation. 406 U.S. at 707. At the time, Section 1391(d) provided that "'[a]n alien may be sued in any district.'" *Id.* at 708. The foreign defendant argued that venue was improper because Section 1400(b) "[wa]s the exclusive provision governing venue in patent infringement litigation, and . . . its requirements were not satisfied." *Id.* at 707. This Court disagreed. The Court acknowledged some "broad language" in prior decisions that had suggested "venue provisions of general applicability" do not apply in patent cases. *Id.* at 711. But this Court concluded that, in enacting Section 1391(d), Congress had established "a principle of broad and overriding application" that applied to both general and special venue laws. *Id.* at 714.

As discussed above, p. 20, *supra*, the Venue Clarification Act substantially revised Section 1391(d). The relevant provision no longer appears as a standalone subsection, but rather has been incorporated (as paragraph (3)) into subsection (c)'s definition of

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[8] If Section 1391(c)(3) did not apply to patent-infringement actions, a foreign corporation could not be sued for patent infringement anywhere in the United States, unless it maintained a "regular and established place of business" in some U.S. district *and* committed infringement there.

residence. 28 U.S.C. § 1391(c)(3). Like the other paragraphs in that subsection, it now applies "[f]or all venue purposes." And its focus is now on residence rather than on citizenship: it now provides a venue defense for lawful permanent residents and foreign corporations doing business in the United States, while eliminating a venue defense for U.S. citizens who are domiciled abroad. *See* House Report 22-23 (describing this change).

To implement this shift, Congress linked paragraph (3) of subsection (c) with paragraphs (1) and (2). Paragraph (1) defines residence as domicile for natural persons, including lawful permanent residents. 28 U.S.C. § 1391(c)(1). Paragraph (2) defines residence for both corporations and unincorporated associations according to whether they are subject to personal jurisdiction in a particular judicial district. *Id.* § 1391(c)(2). Finally, paragraph (3) provides that any defendant that is not a U.S. resident under paragraphs (1) and (2) can be sued in any judicial district. *Id.* § 1391(c)(3).

b. Determining the appropriate venue in patent-infringement actions against foreign defendants is straightforward under Section 1391(c)'s definition of residence. Patent owners may sue individuals who are permanent residents of the United States in the district in which they are domiciled, and foreign businesses in any district in which they are subject to personal jurisdiction. If neither condition applies, the patent owner may sue in any judicial district.[9]

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[9] A foreign defendant could still contest personal jurisdiction, but that defense would fail if the defendant has minimum contacts with the United States as a whole, even if it does not have

By contrast, Heartland's statutory interpretation produces a muddle in cases with foreign defendants. If Section 1391(c)'s definition of residence does not apply, then there would be *no* proper venue in some cases under Section 1400(b). If "residence" in Section 1400(b) were limited to the defendant's place of incorporation, then a foreign corporation could not be sued *anywhere* in the United States, unless it had a "regular and established place of business" in some district *and* committed infringement there. 28 U.S.C. § 1400(b). This Court rejected that counter-intuitive result in *Brunette*. 406 U.S. at 709-10, 713-14. But accepting Heartland's contention that Section 1391(c)'s definitions of "residence" do not apply to Section 1400(b) would produce exactly the result *Brunette* rejected, "effect[ively] oust[ing] the federal courts of a jurisdiction clearly conferred on them by Congress." *Id.* at 710.

To avoid this result, Heartland might argue that paragraph (3) of Section 1391(c) applies to patent venue, but that paragraph (2) does not. But that is not how Heartland has framed this case: its question presented asks whether Section 1400(b) "is not to be supplemented by 28 U.S.C. § *1391(c)*." Pet. i (emphasis added). In any event, there is no way to slice and dice Section 1391(c) that way. Congress applied the prefix "For all venue purposes" to *all three* paragraphs of Section 1391(c)'s definition of residence. The text does not permit reading one prong to apply for "all venue purposes," including patent venue, but another to apply only for *most* venue purposes.

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minimum contacts with (and thus does not "reside" in) any single judicial district or State. *See* Fed. R. Civ. P. 4(k)(2) & advisory committee's note (1993).

In addition to sharing a common prefix, paragraph (3) is linked to the other two prongs in substance. A defendant is "not resident in the United States" for purposes of paragraph (3) if it resides elsewhere under paragraphs (1) and (2), *see* p. 25, *supra*. Paragraph (3) cannot work in patent-infringement cases unless paragraphs (1) and (2) apply as well to define residence.

Apparently recognizing that it needs *some* foreign-defendant rule but cannot look to Section 1391(c), Heartland attempts to revive former Section 1391*(d)*. Heartland asserts, without explanation, that "Section 1400(b) . . . has no application to alien defendants," and cites *Brunette*. Heartland Br. 36 n.13. But *Brunette* did not construe Section 1400(b) to embody that principle. Rather, this Court relied on a statute, Section 1391(d), that has now been substantively amended and moved to Section 1391(c)—which Heartland insists does not apply. This Court is "not free to rewrite the statute that Congress has enacted" by reviving former Section 1391(d) for one limited purpose. *Dodd v. United States*, 545 U.S. 353, 359 (2005). And reviving the old rule would be particularly inappropriate here, because it would contradict Congress's express judgment in 2011 that foreign residence, not "alien[age]," should be what counts for venue purposes. *See* House Report 22-23.

2. Even if Heartland could somehow come up with a way for patent-infringement cases to borrow all of Section 1391(c) *except* for the business-entity definition in paragraph (2), that interpretation would still be full of problems. *Fourco*, and the cases preceding it, addressed only where *corporations* resided at common law. *Unincorporated associations*, such

as LLCs and partnerships, were governed by a different rule: this Court held in 1967 that a "multi-state, unincorporated association" resides and may be sued "where it is doing business." *Denver & Rio Grande*, 387 U.S. at 562. Thus, under Heartland's own theory, *Fourco* would not apply in the many cases in which infringement defendants are LLCs—apparently including this one. *See* note 4, *supra*.

a. In *Fourco*, this Court held that its earlier constructions of the patent-venue statute were not affected by the 1948 recodification of Title 28. 353 U.S. at 227-28. Under those constructions, *corporations* were "residents" or "inhabitants"—the Court noted the terms "are synonymous"—only in their state of incorporation. *Id.* at 226 (quotation marks omitted).[10]

Unincorporated associations have never been subject to this rule. Indeed, this Court explained in *Denver & Rio Grande* that, up until that decision in 1967, "[t]here was no settled construction" of the residence of unincorporated associations for venue purposes. 387 U.S. at 562.

As a result, the Court held that a "multi-state, unincorporated association" (there, a labor union) re-

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[10] Some corporations—notably, national banks—are chartered by the federal government rather than by any State. That was not an issue at the time of *Fourco* because until 1982, national banks had their own, more specific venue statute. *See* 12 U.S.C. § 94 (1976); *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 152 (1976). Section 1391(c)(2) makes it unnecessary to assign national banks to a single State or district because all business entities reside where they are subject to personal jurisdiction. Heartland's proposed rule leaves unclear where national banks and federally chartered corporations would "reside."

sides and may be sued "where it is doing business." *Denver & Rio Grande*, 387 U.S. at 562. That interpretation aligned the rule for unincorporated associations with the rule for *corporate* residence under the 1948 version of Section 1391(c). *Id.* at 559, 562. As noted, p. 20, *supra*, when Congress later expanded the scope of corporate residence in 1988 (adopting the personal-jurisdiction approach), courts divided over whether the residence of unincorporated associations should also expand, or whether the *Denver & Rio Grande* "doing business" definition still controlled. ALI Project 189-91. Congress resolved this question in 2011 by adopting Section 1391(c)(2).

b. Heartland's approach fails to address that many defendants are unincorporated entities. Presumably Heartland believes that Section 1391(c)(2) does not apply in patent-infringement cases *at all*, whether the defendant is an LLC or a corporation. But if Section 1391(c)(2) were inapplicable, then under *Denver & Rio Grande*, unincorporated defendants—like Heartland—would reside wherever they are "doing business."

The result would be a substantial and pointless distinction: (1) corporate defendants would reside only in their state of incorporation, while (2) LLCs, partnerships, and other unincorporated associations would reside wherever they are "doing business." Venue "is primarily a matter of choosing a convenient forum," *Wachovia Bank v. Schmidt*, 546 U.S. 303, 316 (2006) (quotation marks omitted), and there is no difference in litigation convenience that turns on whether a defendant business is organized as a corporation or an LLC. Moreover, neither of these differing definitions appears in the definitional stat-

ute. Congress made clear in the Venue Clarification Act that corporations and unincorporated associations should have the same residence for all venue purposes. Heartland's approach conflicts with Congress's judgment.[11]

Alternatively, Heartland might argue that unincorporated associations, too, reside in a single district for purposes of patent venue. But this approach suffers from two fatal flaws. *First*, it is unworkable; many multi-state business entities (*e.g.*, partnerships) have no state of incorporation and no analogue. *See* ALI Project 199 (noting that it is "no[t] feasible" to define residence for an unincorporated association by the state of incorporation). *Second*, it has no legal foundation. As this Court made clear in *Denver & Rio Grande*, there was "no settled construction" for where unincorporated associations reside at the time of *Fourco*, 387 U.S. at 561, and *Fourco* did not address the question. Heartland cannot point to the 1957 opinion in *Fourco* to justify overriding both a 2011 statute *and* a 1967 holding of this Court.

Fortunately, this Court does not need to tackle the questions of residency for partnerships and LLCs that Heartland's proposal would raise. Determining where different types of business entities should be deemed to reside is a "question[] more readily resolved by legislative prescription than by legal reasoning." *Carden v. Arkoma Assocs., L.P.*, 494 U.S.

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[11] While corporations and unincorporated associations are treated differently when assessing diversity of citizenship, that is because Congress has defined one rule by statute and retained the common-law definition for the other. *See Carden v. Arkoma Assocs., L.P.*, 494 U.S. 185, 196-97 (1990).

185, 197 (1990). And Congress has already provided the prescription in the Venue Clarification Act, for *all* business entities and *all* venue purposes.

D. No Canon Of Construction Or Structural Inference Supports Disregarding The Statutory Definition Of "Residence."

Heartland argues that the decision below "violates multiple canons of statutory construction" and "undermines the statutory structure." Heartland Br. 26, 31 (initial capitalization omitted). But Heartland ignores the "cardinal" canon that courts "should always turn to first before all others": "presume that a legislature says in a statute what it means and means in a statute what it says there." *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992). No canon that Heartland invokes provides a basis to conclude that "for all venue purposes" means "for all venue purposes except for patent venue."

1. Heartland contends (at 39-40) that Congress exempted Section 1400(b) from the general definition of residence for all venue purposes, and it relies on Section 1391(a) as the only textual basis for that argument. But Heartland misreads that provision. Section 1391(a) states that "[e]xcept as otherwise provided by law, this section shall govern the venue of all civil actions." 28 U.S.C. § 1391(a). Heartland focuses on the dependent clause ("Except . . .") but ignores the independent clause. Section 1391 "shall govern venue"—*i.e.*, specify the place where suit may be brought, *see id.* § 1391(b)—"[e]xcept as otherwise provided by law." In other words, Section 1391's default rules for venue will yield if they conflict with specific rules for venue set out by specialized venue

statutes. Thus, as no one disputes, venue in patent-infringement cases is governed by Section 1400(b), rather than by the general venue statute, Section 1391(b).[12]

But the "[e]xcept" language in Section 1391(a) has nothing to do with the definitions in Section 1391(c). Those definitions do not "govern . . . venue"; they merely define the term "resides" in statutes that *do* govern venue, such as Sections 1391(b) and 1400(b). And they supply those definitions "[f]or all venue purposes."

If Section 1391(a) precluded the definitions in Section 1391(c) from applying to special venue statutes, on the theory that those statutes "provide[]" a different definition of "resides" "by law," Section 1391(c) would have little purpose. The only statute it could apply to would be the general venue provision, Section 1391(b). But that cannot be correct. *First*, "For all venue purposes" plainly signals that subsection (c) has an effect beyond just the immediately preceding subsection. Indeed, Congress substituted "For all venue purposes" for the predecessor language "For purposes of venue under this chapter" precisely to cover more special venue statutes. House Report 20. *Second*, Section 1391(c) contains *two* definitions of where a business entity "resides"—one for use when the venue statute turns on the residence of the *defendant*, and one when it turns on the residence of the *plaintiff*. But the general venue statute does not use the *plaintiff's* residence at all. *See* 28 U.S.C.

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[12] For exactly that reason, "except as otherwise provided by law" appeared in the predecessor general venue statutes as well. *See* 28 U.S.C. § 1391(a)-(b) (1988); 28 U.S.C. § 1391(a)-(b) (1952).

§ 1391(b). *Third*, the legislative history confirms that Section 1391(c) applies "*[u]niversally*." House Report 20. Plainly, therefore, the definitions in Section 1391(c) are meant to apply to more specific venue statutes; those statutes do not "provide[]" "otherwise."[13]

Heartland's related contention (at 26-28) that a "specific statute" should "not be controlled or nullified by a general one" fails for the same reason. Heartland relies on *Radzanower v. Touche Ross & Co.*, 426 U.S. 148 (1976), which supports the uncontroversial principle that on-point special venue statutes control over a more general venue statute, such as Section 1391(b). But once again, Section 1400(b) does not define the term "resides"; that definition is provided by Section 1391(c). Applying Section 1391(c)'s definition to a term in Section 1400(b) that Congress had not previously defined does not "nullify" Section 1400(b). If it did, then Section 1391(c) would not apply to *any* specialized venue statutes, which is contrary to what Congress intended.

2. Heartland also asserts (at 23, 31-32) that applying Section 1391(c)'s definition to Section 1400(b) would make Section 1400(b) "a dead letter." Heartland seems to mean that using Section 1391(c)'s def-

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[13] In addition, even if Section 1391(a) were relevant, Heartland still points to nothing that "provide[s] otherwise by law." In *Fourco*, this Court construed a statutory term ("resides") to have its common-law meaning. But merely interpreting what a statute says does not "provide by law" for any different meaning once Congress redefines the term. Because statutory interpretation (what this Court did in *Fourco*) is not the same thing as the formulation of federal common law, the debate between Heartland and the court of appeals over federal common law (Heartland Br. 40) is beside the point.

inition of "residence" would leave the second part of Section 1400(b) unused in most cases. *See also* BSA Br. 18-19; General Electric Br. ("GE Br.") 10-11; Software & Information Industry Ass'n Br. ("Software Br.") 15-16.

But as Heartland implicitly concedes, the second half of Section 1400(b) is not superfluous under the Court of Appeals' interpretation. At a minimum, that clause provides a basis for venue in suits against individual defendants, who are domiciled in only one district. *See VE Holding*, 917 F.2d at 1580 n.17. That is enough to avoid surplusage, because the canon merely counsels that "a statute should be construed so that effect is given to all its provisions," even if that effect is "limited." *Clark v. Rameker*, 134 S. Ct. 2242, 2248-49 (2014) (quotation marks omitted). It does not justify disregarding the statute's plain text to give one phrase more to do. *See Kawashima v. Holder*, 565 U.S. 478, 488 (2012) (rejecting a surplusage argument where two offenses did not formally overlap, even though the government conceded they "almost invariably" would overlap in practice).

In any event, the Court's "preference for avoiding surplusage constructions is not absolute," and it is an "inappropriate" basis for departing from the statute's "plain meaning." *Lamie*, 540 U.S. at 536. "Redundancies across statutes are not unusual events in drafting." *Connecticut Nat'l Bank*, 503 U.S. at 253. And they are unremarkable here, where the drafters of the Venue Clarification Act consciously decided to adopt a generally applicable definition of residence rather than parse through (and harmonize) hundreds of special venue statutes. *See* ALI Project 168-

69. Many venue statutes mirror Section 1400(b)'s structure by designating venue as where the defendant "resides or has a principal place of business"[14] or "resides or transacts business."[15] Section 1391(c)'s definition of "residence" subsumes the "doing business" prongs of all of these statutes, but Heartland cannot plausibly argue that Section 1391(c) does not apply to any of them.

More generally, "redundancy is hardly unusual" for venue statutes. *Marx v. Gen. Revenue Corp.*, 133 S. Ct. 1166, 1177 (2013). For example, the copyright-venue statute provides that suit may be "instituted in the district in which the defendant or his agent resides or may be found." 28 U.S.C. § 1400(a). Because a defendant "may be found" wherever it is subject to personal jurisdiction,[16] the "residence" prong of Section 1400(a) is redundant regardless of how residence is defined. Other venue statutes use a similar belt-and-suspenders approach.[17]

3. Heartland also argues (at 32-36) that Section 1391(c)'s definition of residence should not apply to Section 1400(b) in order to avoid creating an inconsistency with 28 U.S.C. § 1694. That statute provides that "[i]n a patent infringement action commenced in a district where the defendant is not a res-

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[14] 7 U.S.C. §§ 210, 499g.

[15] 15 U.S.C. §§ 53, 68c, 69g, 70f; 29 U.S.C. § 160(e), (j); 42 U.S.C. § 9613.

[16] *See* ALI Project 212 & n.93 (citing cases).

[17] *See, e.g.*, 15 U.S.C. § 78aa (securities action may be brought, *inter alia*, in the "district wherein the defendant is found or is an inhabitant or transacts business"); 18 U.S.C. § 1965(a) (civil RICO claim may be brought in any district in which the defendant "resides, is found, has an agent, or transacts his affairs").

ident but has a regular and established place of business," service of process may be effected on the defendant's agent. 28 U.S.C. § 1694. Heartland observes that Section 1694's structure presupposes the narrow definition of "residence" applied in *Fourco*, and it argues that "residence" should retain the same meaning in the venue statute because the two provisions were originally linked.

But the difference in meaning under current law is simply the result of legislation that overhauled venue rules without touching service-of-process statutes. In drafting the proposal that led to the Venue Clarification Act, the ALI Reporters decided to modify the definitions of residence applicable to all venue statutes while "exclud[ing] . . . issues of service of process" from the ALI Project's scope. ALI Prospectus 855. They did so in part because Federal Rule of Civil Procedure 4(k) provides an effective means for service of process that applies across different causes of action and bases for venue. *Ibid.*; *see also* 14D Charles Alan Wright et al., *Federal Practice & Procedure* § 3823, at 3 (4th ed. 2016) (noting that Section 1694 "is permissive . . . and does not preclude other means of service"). It is thus unsurprising that, after Congress revised venue law without addressing corresponding service-of-process rules, the definitions of residence in Section 1400(b) and Section 1694 no longer align, or that patent owners rely on Rule 4(k) to serve process in patent-infringement actions.[18]

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[18] Heartland also relies on an uncodified provision of patent law providing that in cases involving a particular kind of financial patent, an ATM "shall not be deemed to be a regular and established place of business for purposes of section 1400(b)." Leahy-Smith America Invents Act of 2011, § 18(c), 35 U.S.C. § 321

4. Finally, Heartland notes in passing that Section 1400(b) uses the definite article "the" in the clause "the judicial district where the defendant resides," which supposedly "suggest[s] inhabitancy is in a singular place." Heartland Br. 4, 23; *see also* BSA Br. 18; GE Br. 10. But "words importing the singular include and apply to several persons, parties, or things." 1 U.S.C. § 1; *accord* 28 U.S.C. § 1391 Revisers' Note (1952). Heartland cannot rely on "the" to keep the statutory definition of "residence" at bay.

First, Heartland ignores the context. Section 1400(b) uses the definite article "the" before *both* of its venue options. And it is undisputed that the second option—any judicial district "where the defendant has committed acts of infringement and has a regular and established place of business," 28 U.S.C. § 1400(b)—may encompass more than one district. Furthermore, even under Heartland's interpretation of "residence," a corporation that is incorporated in a state with multiple judicial districts may "reside" in more than one district.[19]

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note. That statute was enacted before the 2011 Act, and so sheds no light on what the later statute means; it also does not change the provision making patent venue proper in the district of "residence." Because of the history of venue complexity involving national banks as defendants, *see* note 10, *supra*, Congress may simply have decided to take extra care with this limited set of financial patents.

[19] At the time of *Fourco*, a corporation formed in a multiple-district state was deemed to reside in the district *in that state* where its principal place of business was located. *See Galveston, Harrisburg & San Antonio Ry. Co. v. Gonzales*, 151 U.S. 496, 504 (1893). But that rule does not help when the principal place of business is *outside* the state of incorporation.

Second, even if Congress contemplated a singular "residence" when it enacted Section 1400(b), that does not prevent a change in meaning when Congress adopted a definition of "residence" "[f]or all venue purposes." 28 U.S.C. § 1391(c). Indeed, the drafters of Section 1391(c) specifically intended for its definitions to apply to a civil-action provision of the Jones Act. *See* ALI Project 157 & n.5, 189. And at the time, the Jones Act referred to "*the* district" where "the defendant employer resides or in which his principal office is located." 46 U.S.C. app. § 688 (2000) (emphasis added).

Congress adopted an explicit and universal definition of residence. It was not required to take the further step of changing "the" to "a" throughout the U.S. Code.

II. *Fourco*'s Interpretation Of An Earlier Statute Cannot Justify Disregarding The Plain Language Of The Current Statute.

Heartland's primary argument for departing from Section 1391(c)'s unambiguous definitions is that this Court construed the previous venue statutes differently in *Fourco*. But this Court's holding does not prevent Congress from amending the venue statutes to change the meaning of a previously undefined term—whether or not this Court has previously construed that term. And when Congress *changes* the law, there is no presumption that it intends to preserve interpretations of the previous law.

A. *Fourco* Does Not Control The Interpretation Of A Statute That Congress Subsequently Amended.

This Court's decision in *Fourco*, which addressed the relationship between Section 1400(b) and an earlier version of Section 1391(c), does not control here. *Fourco* relied on legislative history stipulating that Congress did not intend to make substantive changes when recodifying Title 28 in 1948. The decision provides no basis for this Court to ignore subsequent amendments to venue laws that undeniably *are substantive*, and which give the relevant statutory term a different meaning than the *Fourco* Court adopted.

1. Before the recodification, this Court had held that the patent-venue statute in force under the 1911 Judicial Code was "the exclusive provision controlling venue in patent infringement proceedings," and was not supplemented by a generally applicable venue provision for suits against multiple defendants. *Stonite Prods. Co. v. Melvin Lloyd Co.*, 315 U.S. 561, 563 (1942). Then in *Fourco*, the Court addressed whether the 1948 revision and recodification of Title 28 had abrogated *Stonite*'s holding. 353 U.S. at 224-25.

Relying heavily on the 1948 legislative history, the Court held that the recodification had not made general venue rules applicable to the patent-venue statute. In particular, the Court noted that the Judiciary Committee Reports from both the House and Senate, as well as statements by those responsible for recodification, were "uniformly clear that no changes of law or policy [were] to be presumed from changes of language in the revision" absent a clear

statement "explained in detail in the Revisers' Notes." *Fourco*, 353 U.S. at 226-27. Because "the Revisers' Notes d[id] not express any substantive change" concerning patent venue, the Court concluded that the 1948 recodification did not alter the patent-venue statute in any way. *Id.* at 227-28.

As this Court later acknowledged, *Fourco* did not apply "the more natural reading" of Section 1391(c). *Pure Oil Co. v. Suarez*, 384 U.S. 202, 206 (1966). Rather, the result was driven by the legislative history of the 1948 recodification of Title 28, which showed that "Congress wished [section 1400(b)] to remain in substance precisely as it had been before the revision." *Ibid.*; *see also Brunette*, 406 U.S. at 712 (noting that *Fourco* "rested heavily on . . . legislative history"). The Court has discounted wording changes made by the 1948 recodification in several other contexts. *E.g.*, *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 136 (2008); *Keene Corp. v. United States*, 508 U.S. 200, 209 (1993); *Tidewater Oil Co. v. United States*, 409 U.S. 151, 161-63 (1972).

The precedential force of *Fourco* is accordingly "limited to the particular question of statutory construction presented there." *Pure Oil*, 384 U.S. at 206. *Fourco* does not establish that Section 1400(b) is uniquely and permanently insulated from amendments to venue law, or suggest that Congress cannot define terms appearing in Section 1400(b) without amending Section 1400(b) itself.[20] The Court merely

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[20] And no such restriction exists. For instance, the Pregnancy Discrimination Act overturned a decision of this Court construing one provision of Title VII, by adding a definition to a *different* provision of Title VII. *See, e.g.*, *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 88-89 (1983).

held that the 1948 recodification did not have any substantive effect on patent venue, because that recodification made changes without substantive effect.

2. The venue statutes have been materially revised since *Fourco* was decided in 1957. Collectively, the changes to the law unambiguously establish that "resides" in Section 1400(b) is defined by Section 1391(c).

First, Section 1391(c) is now framed as a purely definitional provision that determines the meaning of "residence" for all litigants—plaintiff and defendant, natural person, corporation, and unincorporated association. 28 U.S.C. § 1391(c). By contrast, in 1957, the statute provided the general rule for where "[a] corporation may be sued," and then stipulated that the district "shall be regarded" as the corporation's residence "for venue purposes." *Fourco*, 353 U.S. at 223. *Second*, after Section 1391(c) was amended in 1988 to provide the definition of corporate residence "[f]or purposes of [Chapter 87]," p. 5, *supra*, Congress consciously expanded Section 1391(c)'s scope by defining residence "[f]or *all* venue purposes," 28 U.S.C. § 1391(c) (emphasis added). *Third*, Congress specifically defined "venue" by enacting Section 1390. 28 U.S.C. § 1390(a). That provision forecloses any argument that Section 1400(b) is not a "venue" statute within the meaning of Section 1391(c).[21]

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[21] Several of Heartland's amici argue that the current language in Section 1391(c) is "materially identical" to the text at the time of *Fourco* ("for venue purposes"). Software Br. 5; *see also, e.g.*, GE Br. 13-14; Intel Br. 13. That, of course, disregards the important word "all." And neither Heartland nor any of its amici addresses the import of Section 1390(a), or the structural

In contrast to *Fourco*, nothing about the legislative context surrounding these changes suggests they should be disregarded as non-substantive. The Venue Clarification Act was not a recodification project. It sought to *clarify* and *simplify* existing venue law. *See* House Report 1-2; ALI Project 1-2. And several key clarifications were accomplished by revising Section 1391(c) and making it "apply globally to all venue statutes, whether of general or special applicability." ALI Project 188-89; *see* House Report 20.

3. Heartland nonetheless contends that the rule from *Fourco* remains controlling absent a clear statement from Congress expressly overriding it. *See* Heartland Br. 28-29; *see also, e.g.*, GE Br. 12-13; Intel Br. 12-13; Software Br. 14-17.[22] Even if such a clear-statement rule did apply, the Venue Clarification Act would satisfy it. How much clearer could Congress have been than stipulating that Section 1391's definition of "residence" applies "[f]or all venue purposes" and defining "venue" in a way that clearly includes Section 1400(b)? *Cf. RJR Nabisco, Inc. v. European Cmty.*, 136 S. Ct. 2090, 2102 (2016) (holding that defining racketeering activity to include offenses involving foreign conduct qualified as

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changes to Section 1391(c) that have transformed it into an all-purpose definitional section, rather than merely the rule for corporate venue. In fact, not one of the petitioner's-side briefs even *cites* Section 1390, except for one reference that is clearly a typo, App Ass'n Br. 15. In any event, *Fourco* did not decide the effect that "for venue purposes" would have had *outside the recodification context*. *See* pp. 40-41, *supra*.

[22] Although several of Heartland's amici invoke *stare decisis*, Heartland properly concedes that *stare decisis* is not implicated because the relevant statutory language has changed since *Fourco*. *See* Heartland Br. 28.

a "clear indication" that RICO applied extraterritorially even absent an "express statement").

But in fact, there is no clear-statement rule that Congress must overcome to depart from this Court's interpretation of a superseded statute. When Congress enacts new legislation that amends existing law, this Court has simply applied the plain text of the new law, *regardless of whether doing so abrogates its precedent*. *See, e.g.*, *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 558 (2005) ("No sound canon of interpretation requires Congress to speak with extraordinary clarity in order to modify the rules of federal jurisdiction within appropriate constitutional bounds."); *Desert Palace*, 539 U.S. at 98 (treating the question whether the Civil Rights Act of 1991 abrogated Title VII precedent as irrelevant, because "the starting point for [the Court's] analysis is the statutory text"); *Ex parte Collett*, 337 U.S. 55, 60-61 (1949) (holding that the plain language of 28 U.S.C. § 1404(a) authorized transfers for convenience in suits under the Federal Employers' Liability Act ("FELA"), even though the Court had previously held that FELA's venue provision precluded such transfers under the doctrine of *forum non conveniens*).

For example, in *Allapattah*, the Court addressed how its precedents had been affected by the new supplemental-jurisdiction statute, 28 U.S.C. § 1367. The Court held that, "by its plain text," the new Section 1367 "overruled" three of the Court's precedents applying jurisdictional statutes. 545 U.S. at 558, 566-67. The Court so held even though the legislative history of Section 1367 indicated that Congress had specifically set out to overrule only one of the

three precedents (*Finley v. United States*, 490 U.S. 545 (1989)), and the House Judiciary Committee Report suggested that some Members of Congress intended to preserve pre-*Finley* precedent. *Id.* at 567-68. As the Court explained, "no sound canon of interpretation" could justify "adopt[ing] an artificial construction" of the statute "that is narrower than what the text provides." *Id.* at 558. The Court should apply the same approach here. Indeed, the argument for ignoring the statutory text in order to follow pre-amendment precedent is even weaker here than it was in *Allapattah*, because the statutory history confirms the plain-text reading. *See* pp. 18-22, *supra*.

The authorities invoked by Heartland (at 28-29) do not support a contrary result. Heartland cites *Midlantic National Bank v. New Jersey Dep't of Environmental Protection*, 474 U.S. 494 (1986), but in that case, Congress had "codif[ied] [a] judicially developed rule," *id.* at 501. In the codification context, the Court naturally presumes that Congress intended to adopt the "judicially created concept" in full absent a clear indication to the contrary. *Ibid.* That presumption is not relevant to the Venue Clarification Act, which sought to simplify and clarify venue statutes, not to codify preexisting judicial doctrine.

Heartland likewise takes a passage from *Reading Law* out of context. Heartland Br. 28-29; *see also* Intel Br. 19-20. The excerpted paragraph comes from the treatise's discussion of the presumption against implied repeal. It explains that Congress should not be presumed to displace the authoritative construction of a term in an earlier statute just because it uses the same term in a new context that is incon-

sistent with the established meaning. Scalia & Garner 330-31. But this is not an implied-repeal case. Section 1391(c) did not impliedly repeal Section 1400(b). *Accord Collett*, 337 U.S. at 60-61 (decision by Congress "to remove" a venue provision's "judicial gloss via another statute" is not equivalent to an implied repeal). Nor did Section 1391(c) merely use the term "residence" in a manner that is in tension with this Court's construction of "reside" in *Fourco*. Rather, Congress expressly *defined* "residence" for all venue purposes, which the text makes clear encompasses Section 1400(b). As the treatise explains elsewhere, Congress's definition is controlling. *See* Scalia & Garner 228.

4. Heartland refers in passing (at 30) to two decisions after *VE Holding* that supposedly reaffirmed *Fourco*. But both are clearly off-point. One case, *Cortez Byrd Chips, Inc. v. Bill Harbert Construction*, 529 U.S. 193 (2000), predates the Venue Clarification Act, and it simply recites *Fourco*'s holding while finding it "beside the point" for the arbitration issue presented, *id.* at 204. In *Atlantic Marine Construction Co. v. United States District Court*, 134 S. Ct. 568 (2014), the Court merely observed in a footnote that Section 1391 governs "venue generally," which it distinguished from "specific venue provision[s]" such as Section 1400. *Id.* at 577 n.2. That unremarkable observation is fully consistent with the decision below because, once again, the question is not whether Section 1400(b) governs venue in patent-infringement cases (it does), but rather how "resides" in Section 1400(b) is defined. *See* Pet. App. 7a. And nothing in *Atlantic Marine*'s footnote suggests that Section 1391(c)'s definitions of "residence" do not apply to specific venue provisions.

B. Heartland's Focus On The Federal Circuit's Interpretation Of An Earlier Version of Section 1391(c) Is Misplaced.

Heartland and its amici have briefed this case as though the relevant question were whether, in 1990, the Federal Circuit correctly interpreted the 1988 amendment to Section 1391, which have since been superseded. But as previously noted, p. 15, *supra*, the Court's task is to interpret "existing statutory text, and not the predecessor statutes." *Lamie*, 540 U.S. at 534. In other words, it does not matter whether *VE Holding* was correctly decided in 1990. What does matter is that, following the Venue Clarification Act, Section 1391(c) unambiguously provides the meaning of "resides" in Section 1400(b).

1. Because Heartland focuses so heavily on *VE Holding* and the 1988 amendments, it puts forward arguments that read as though the Venue Clarification Act never happened. For example, Heartland contends that *VE Holding* violated "the principle that Congress does not . . . hide elephants in mouseholes," because the Federal Circuit re-interpreted patent venue based on changes to Section 1391(c) that were included in the "Miscellaneous Provisions" section of the 1988 Act. Heartland Br. 31 (quotation marks omitted). In fact, the available evidence indicates that the 1988 Act's drafters specifically revised Section 1391(c) during the drafting process to apply to all venue statutes in Chapter 87 and *not* just to the general venue statutes. *See* Alan B. Rich et al., *The Judicial Improvements and Access to Justice Act: New Patent Venue, Mandatory Arbitration and More*, 5 High Tech. L.J. 311, 317-20 (1990) (quoting Judi-

cial Conference subcommittee memoranda detailing the refinement of the legislative proposal).

In any event, whatever might be said of the 1988 Act, the Venue Clarification Act is no mousehole. To the contrary, the Act has been described by an academic proponent as "the most far-reaching package of revisions to the Judicial Code" for two decades.[23] Nor were the Venue Clarification Act's implications for patent venue hidden. As discussed, pp. 21-22, *supra*, the ALI Reporters who drafted the Act *endorsed VE Holding*, and they also made clear that the new version of Section 1391(c) would apply "globally" to all venue statutes. Congress adopted this new version of Section 1391(c) without restricting its scope in any way. In doing so, Congress effectively ratified—and indeed extended—the Federal Circuit's rule from *VE Holding*. *See Lindahl v. OPM*, 470 U.S. 768, 782-83 (1985) (holding that Congress had intended to incorporate a lower-court doctrine where it had shown awareness of the doctrine and amended the statute to be consistent with its application).

2. When Heartland at last turns to the current statute (at 39-42), it all but ignores Section 1391(c). Instead, Heartland focuses on Section 1391(a) and its "Except as otherwise provided by law" clause, which Heartland reads as a reference to this Court's construction of Section 1400(b) in *Fourco*. Heartland's amici also interpret this provision—along with the substitution of "[f]or all venue purposes" for "[f]or purposes of venue under this chapter"—as a repudia-

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[23] Arthur Hellman, *The Federal Courts Jurisdiction and Venue Clarification Act is Now Law*, Jurist, Dec. 30, 2011, http://www.jurist.org/forum/2011/12/arthur-hellman-jvca.php.

tion of *VE Holding*. *See, e.g.*, BSA Br. 16; GE Br. 13-14; Intel Br. 12; Software Br. 11-14. But the notion that the Venue Clarification Act sought to return *Fourco* from exile is fanciful. The text will not bear that interpretation. *See* pp. 31-33 & note 21, *supra*. And not a word in the legislative history suggests such a purpose. To the contrary, the ALI Project, the House Report, and—most importantly—the statutory text all demonstrate that Congress intended to *refine* Section 1391(c) and *expand* its sweep, supplying definitions of "residence" for all venue purposes. *See* pp. 17-22, *supra*.

III. Heartland's Policy Arguments Do Not Justify Departing From The Plain Text Of The Statute.

Heartland and its amici maintain that applying Section 1391(c)'s definition of "residence" to patent venue has encouraged forum shopping and concentrated patent litigation in just a handful of judicial districts. Of course, policy arguments cannot justify ignoring the statute's plain text. *See Laborers Health & Welfare Trust Fund v. Advanced Lightweight Concrete Co.*, 484 U.S. 539, 551 (1988). And in any event, resurrecting the *Fourco*-era definition of "residence" would not solve the problems that Heartland and its amici identify. Limiting a business's residence to its place of incorporation would not materially decrease the concentration of patent litigation in just a handful of judicial districts. Moreover, applying such a restrictive definition would create new problems, including requiring patent owners to file duplicative lawsuits in different districts if the infringers are incorporated in different States. By contrast, although there are legiti-

mate concerns about the status quo, district courts have a number of options to remedy inappropriate forum selection in individual cases, without judicially rewriting the venue statutes or limiting plaintiffs to a single one-size-fits-all venue.

More generally, Congress is better positioned to address the policy concerns that Heartland and its amici raise. This Court is presented with a binary choice: use Section 1391(c)'s definition of residence, or apply Heartland's place-of-incorporation rule. Congress, however, can adopt more tailored reforms that could eliminate the excesses of the current regime without creating new problems. It should be allowed to do so.

A. Limiting Residence To A Corporation's Place Of Incorporation Is Unduly Restrictive And Would Make Patent Litigation More Burdensome, Not Less.

1. Heartland's approach to corporate "residence" is out-of-sync with modern venue principles. *See generally* Paul R. Gugliuzza & Megan M. La Belle, *The Patently Unexceptional Venue Statute*, 66 Am. U. L. Rev. (forthcoming 2017) (manuscript at 6-11), https://ssrn.com/abstract=2914091. Over the past century, Congress has repeatedly expanded the statutory definition of corporate "residence" to "bring venue law in tune with modern concepts of corporate operations." *Pure Oil*, 384 U.S. at 204; *see* pp. 4-8, *supra* (describing the evolution of venue law). There is no reason to believe that Congress intended to insulate patent-infringement cases from this moderniz-

ing trend.[24] Indeed, applying the incorporation-based definition of residence to patent-infringement litigation today would impose undue and impractical restrictions on where patent owners can sue—potentially forcing actions into districts that have no meaningful connection to the litigation, while excluding the district in which a company has its main place of business.

Consider, for example, a case involving an infringer that is incorporated in Delaware, has its principal place of business in the Northern District of California, and manufactures an infringing product at a place of business in the Southern District of Indiana. Under Heartland's rule, the patent owner could file suit in the District of Delaware and the Southern District of Indiana, but *not* in the Northern District of California where the defendant is headquartered, because no "acts of infringement" were committed in that district, 28 U.S.C. § 1400(b). Venue would be further restricted, to the state of incorporation alone, if the defendant does not have a "regular and established place of business" where the infringement takes place, *ibid.*, as might frequently occur when the defendant imports an infringing article, or induces infringement by others under 35 U.S.C. § 271(b).

That extraordinary restriction on the choice of forum makes little sense. The purpose of venue is to

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[24] Contrary to the suggestion of Heartland and some amici that Section 1400(b) should be interpreted narrowly because Congress had a "restrictive intent" in 1897 when it enacted the special patent venue statute (*e.g.*, Heartland Br. 21; Software Br. 5), the 1897 statute actually *expanded* venue options for patent claimants as compared to what was available under the general venue statute in federal question cases. *See Brunette*, 406 U.S. at 712-13 & n.13; p. 3, *supra*.

"protect *the defendant* against the risk that a plaintiff will select an unfair or inconvenient place of trial." *Leroy*, 443 U.S. 183 (citations omitted). What possible interest is served by a rule that forbids suing a defendant in its own principal place of business? Notably, while Heartland and its amici attempt to justify their rule as a way of limiting forum-shopping by non-practicing entities ("NPEs") (*e.g.*, Texas Br. 13-14; Electronic Frontier Found. Br. 11-12; Software Br. 21-24), that rule would apply to *all* patent-infringement plaintiffs; it could readily prevent an operating company or research university from suing an infringer in the district in which both plaintiff and defendant are headquartered. Unless infringement occurred in the district, Oracle could not sue Google in Northern California.

2. A place-of-incorporation approach to residence would impose particularly significant burdens on patent owners in infringement litigation involving multiple defendants, which is common. *See, e.g.*, *Otsuka Pharm. Co. v. Torrent Pharm. Ltd.*, 99 F. Supp. 3d 461, 471 (D.N.J. 2015) (patent-infringement litigation involving more than two dozen related cases). Because venue must be proper as to *each* defendant, *see Stonite*, 315 U.S. at 562-63, and defendants often must be sued separately, *see* 35 U.S.C. § 299, patent owners facing multiple infringers would regularly be unable to sue them all in a single district: if just one defendant is incorporated outside of the district and does not both commit infringement and have a "regular and established place of business" there, venue would be improper. 28 U.S.C. § 1400(b). Parallel infringement cases that might involve "precisely the same issues" would thus have to proceed in scattered courts throughout the country, leading to the

"waste[] of time, energy, and money." *Continental Grain Co. v. Barge FBL-585*, 364 U.S. 19, 26 (1960). It would also tilt the playing field against patent owners, who (unlike accused infringers) would be subject to non-mutual issue preclusion if they lost in one forum. *See Blonder-Tongue Labs., Inc. v. University of Ill. Found.*, 402 U.S. 313, 329-30 (1971).

The multidistrict-litigation statute, 28 U.S.C. § 1407(a), would not be an effective solution to this problem. Section 1407 only permits consolidation of separately filed lawsuits in a single district for *pretrial* proceedings; each case would still be remanded to a separate district for trial. *See Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 28 (1998). This shuttling back and forth between multiple districts would increase litigation costs, which are already notoriously high in patent cases, as Heartland's amici lament. *E.g.*, Intel Br. 33.

3. Heartland and its amici identify the clustering of patent cases in a small number of judicial districts as one of the principal problems with the current system. *See, e.g.*, ABA Br. 7-9; GPhA Br. 3, 11. But if this is a problem, Heartland's proposed rule would not solve it. *Accord* AIPLA Br. 17-18 (explaining that Heartland's approach "could further concentrate patent litigation in certain district courts"). A recent academic study predicts that if Heartland's view of Section 1400(b) were adopted, then almost half of infringement cases filed by operating companies (49.8 percent) would still be filed in only four districts: the District of Delaware, the Central District of California, the District of New Jersey, and the Eastern District of Texas. *See* Colleen V. Chien & Michael Risch, *Recalibrating Patent Venue* 35 tbl.6 (Oct. 6, 2016),

Santa Clara Univ. Legal Studies Research Paper No. 10-1, https://ssrn.com/abstract=2834130. The same study predicts that under Heartland's rule, just three districts (the Eastern District of Texas, the District of Delaware, and the Northern District of California) would account for more than 62% of all NPE cases. *See ibid.*

Unsurprisingly, the District of Delaware would become a dominant forum if Heartland's place-of-incorporation approach were adopted. "More than 66% of all publicly-traded companies in the United States including 66% of the Fortune 500 have chosen Delaware as their legal home." Del. Dep't of State, Div. of Corporations, *About Agency*, https://corp.delaware.gov/aboutagency.shtml. Delaware already hosts a significant amount of patent-infringement litigation, to the point that one of Heartland's amici contends there is an "undue concentration" of cases in that district. GPhA Br. 3. Indeed, then-Chief Judge Sue Robinson warned in 2013 that she and her colleagues (the district has just four authorized judgeships) were already struggling to keep up with the growing patent docket and "[could not] keep this level of work up indefinitely." *Federal Judgeship Act of 2013: Hearing Before the Subcomm. on Bankruptcy and the Courts of the S. Comm. on the Judiciary*, 113th Cong. 3 (2013). Yet if Heartland prevails, patent litigation in Delaware would *increase*, with projections suggesting that Delaware would serve as the forum for almost 20% of patent-infringement cases brought by operating companies and more than 25% of cases initiated by NPEs. Chien & Risch 35 tbl.6; *see also* Jeanne C. Fromer, *Patentography*, 85 N.Y.U. L. Rev. 1444, 1492 (2010) (predicting a "megacluster of patent cases in the Dis-

trict of Delaware" if Congress had adopted a 2006 Senate bill to restrict patent venue).

In short, adopting Heartland's interpretation would not disperse patent-infringement cases throughout the country. Rather, it would merely reshuffle the ranking of the most common forums.

4. Heartland's approach to venue would also create an unjustified disparity between patent owners and accused infringers who file declaratory-judgment actions. Because Section 1400(b) applies only to actions "for patent infringement," 28 U.S.C. § 1400(b), the general venue statute, *id.* § 1391(b), determines venue in suits for a declaratory judgment of patent invalidity or non-infringement. *See VE Holding*, 917 F.2d at 1583. Section 1391(b) affords an accused infringer a wide choice of venue for bringing a declaratory-judgment action. *See* 28 U.S.C. § 1391(b), (c)(2).[25] Under Heartland's view, patent owners would have much more limited venue options if they sue first for infringement. Heartland provides no justification for this disparate treatment.

B. Forum-Shopping Concerns Can Be Addressed Without Adopting Heartland's Restrictive Approach To Patent Venue.

1. The rule the Federal Circuit applied here—that a corporation or unincorporated business entity resides where it is subject to personal jurisdiction—is

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[25] The Federal Circuit recently broadened personal jurisdiction for declaratory judgment actions against NPEs that have sent warning letters into a forum. *See Xilinx, Inc. v. Papst Licensing GmbH & Co. KG*, __ F.3d __, 2017 WL 605307 (Fed. Cir. Feb. 15, 2017).

the same rule that applies generally in non-patent cases. *See* 28 U.S.C. § 1391(b), (c)(2); pp. 5-6, *supra*. Thus, for example, there is no venue-based obstacle to suing a corporation in the Eastern District of Texas in a mass-tort or products-liability case, if personal jurisdiction is proper. Corporations have lived with that rule for nearly 30 years, and with an almost-as-broad rule (making venue proper where a corporation "is doing business") for 40 years before that. Yet outside the patent-infringement context, that rule is not particularly controversial. Why the loud protests about forum-shopping here?

As Heartland itself suggests, the real reason may be the Federal Circuit's approach to personal jurisdiction in patent-infringement cases. *See* Heartland Br. 35; *see also* Wash. Legal Found. Br. 20-32. Beginning with *Beverly Hills Fan*, the Federal Circuit has upheld specific jurisdiction predicated on "indirect shipments" of an infringing product into the forum through established distribution channels, 21 F.3d at 1564-66. *See Nuance Commc'ns, Inc. v. Abbyy Software House*, 626 F.3d 1222, 1233 (Fed. Cir. 2010) (describing the *Beverly Hills Fan* "stream of commerce" theory). In district court, Heartland identified *Beverly Hills Fan*—*not* the Federal Circuit's venue precedent, which came earlier—as the reason that "patent plaintiffs began flocking to the Eastern District of Texas." J.A. 39 n.2. Heartland also previously argued that recent decisions from this Court, such as *Walden v. Fiore*, 134 S. Ct. 1115 (2014), had called Federal Circuit personal-jurisdiction precedent into question. *See* J.A. 33a-38a; Pet. App. 8a-9a.

In an appropriate case, this Court could review whether the Federal Circuit's approach to personal jurisdiction in patent-infringement cases is sound. But that question is not presented here, because Heartland chose not to petition on it. *See* Pet. i. And this Court should not allow policy concerns about the Federal Circuit's personal-jurisdiction precedent to influence its interpretation of the venue statutes: narrowing personal jurisdiction would narrow venue as well, *see* 28 U.S.C. § 1391(c)(2), but the converse is not true.

2. Heartland's view of patent venue is not only too restrictive, but also too rigid, because there would be no mechanism to choose another district in appropriate cases. By contrast, when multiple venues are permissible, 28 U.S.C. § 1404(a) provides a meaningful safeguard against venue abuse. Where the plaintiff's choice of venue is technically proper but another forum is more appropriate, Section 1404(a) gives district judges discretion to order transfer based on case-specific factors. *See Norwood v. Kirkpatrick*, 349 U.S. 29, 32 (1955).

Several of Heartland's amici contend that Section 1404(a) has not been an effective solution to forum-shopping, and they assert that judges in the Eastern District of Texas in particular have been reluctant to grant transfers. *See, e.g.*, Acushnet Br. 18-19; BSA Br. 7; Software Br. 25-27. The data do not support these claims. In 2014, the judges in the Eastern District of Texas granted almost half of the transfer motions filed—a higher grant rate than the Northern District of California.[26] And in 2015, the grant rate

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[26] Brian C. Howard, 2014 *Patent Litigation Year in Review*, LEX MACHINA 9 (Mar. 2015).

for the Eastern District of Texas increased to over *two-thirds*.[27] Moreover, if a district judge unreasonably denies a Section 1404(a) transfer motion, immediate appellate review is available under the Federal Circuit's mandamus jurisdiction. In recent years, the Federal Circuit has granted several mandamus petitions seeking transfer, many from the Eastern District of Texas. *See, e.g.*, *In re Toyota Motor Corp.*, 747 F.3d 1338 (2014); *In re Apple, Inc.*, 581 Fed. Appx. 886 (2014); *In re WMS Gaming, Inc.*, 564 Fed. Appx. 579 (2014); *In re TOA Techs., Inc.*, 543 Fed. Appx. 1006 (2013); *In re Verizon Bus. Network Servs.*, 635 F.3d 559 (2011); *In re Genentech*, 566 F.3d 1338 (2009); *In re TS Tech United States Corp.*, 551 F.3d 1315 (2008).[28] And even if too few transfers were being granted between permissible venues, drastically reducing the number of permissible venues would not be the appropriate solution.

C. Congress Is Better Situated To Reform Patent Venue Appropriately.

In recent years, Congress has considered several proposals to revise the rules for patent venue. There is no need for this Court to pretermit that process. Indeed, it is telling that congressional proponents of venue reform have recognized that "simply returning to the 1948 framework" for venue "would be too strict

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[27] Brian C. Howard & Jason Maples, *Patent Litigation Year in Review 2015*, LEX MACHINA 10 (Mar. 2016).

[28] The Federal Circuit applies regional circuit precedent when reviewing transfer decisions, *see TS Tech*, 551 F.3d at 1319, and the Fifth Circuit subjects Section 1404(a) denials to careful review under its mandamus jurisdiction, *see In re Volkswagen of Am., Inc.*, 545 F.3d 304, 308-09 (5th Cir. 2008) (en banc) (ordering transfer from the Eastern District of Texas).

for modern patterns of technology development and global commerce." H.R. Rep. No. 110-314, at 40 (2007). Instead, the leading proposals seek to address problems with the current system without unduly restricting available venue choices, particularly to operating-company plaintiffs (like Kraft here) and research universities. *See* AIPLA Br. 18-19.

For example, in the last Congress, the House Judiciary Committee reported a bill that would have allowed venue in patent-infringement cases in a district where: (1) the defendant has its principal place of business or is incorporated; (2) the defendant committed an infringing act and has a regular established physical facility; (3) the defendant has consented to suit; (4) an inventor conducted research and development that led to the patent; or (5) any party has a physical facility where it engaged in research and development related to the patent, manufactured a commercial embodiment of the patent, or performed the patented manufacturing process. H.R. 9, 114th Cong. § 3(g) (Jul. 29, 2015). A similar proposal was introduced in the Senate. S. 2733, 114th Cong. § 2 (2016).

Such proposals are carefully calibrated to eliminate forum-shopping by NPEs without dramatically restricting the venue choices available to other types of plaintiffs. They would, for instance, allow universities to bring suit in the districts where they performed research related to the patented inventions. Similarly, the study discussed above predicts that only 18% of operating-company plaintiffs would have to file their claims in a different district under this proposal. Chien & Risch 34. By comparison, over half of operating-company plaintiffs would have to

choose a different forum under Heartland's approach to patent venue. *Ibid.*

The current patent-venue system may be imperfect. But Heartland's proposed cure is worse than the disease. The Court should affirm the judgment below and let Congress continue the work of refining patent venue.

* * * * *

Under the statutory text in force *now*, this case is straightforward. "All venue purposes" does not mean "some venue purposes" or "all venue purposes except for patent venue." Rejecting that plain reading would make a hash of Congress's attempt to define "residence" comprehensively: patent owners, unlike every other federal plaintiff, would be left profoundly uncertain about where they can sue unincorporated entities, and whether they can sue foreign defendants at all. The Court can avoid this unnecessary confusion by simply following its own oft-repeated maxim: that "Congress says what it means and means what it says." *Simmons v. Himmelreich*, 136 S. Ct. 1843, 1848 (2016).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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March 1, 2017

APPENDIX

STATUTORY APPENDIX

1. The current version of Title 28 of the United States Code, Chapter 87 (District Courts; Venue), provides in pertinent part:

§ 1390. Scope.

(a) Venue defined.—As used in this chapter, the term "venue" refers to the geographic specification of the proper court or courts for the litigation of a civil action that is within the subject-matter jurisdiction of the district courts in general, and does not refer to any grant or restriction of subject-matter jurisdiction providing for a civil action to be adjudicated only by the district court for a particular district or districts.

(b) Exclusion of certain cases.—Except as otherwise provided by law, this chapter shall not govern the venue of a civil action in which the district court exercises the jurisdiction conferred by section 1333, except that such civil actions may be transferred between district courts as provided in this chapter.

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§ 1391. Venue generally.

(a) Applicability of section.—Except as otherwise provided by law

(1) this section shall govern the venue of all civil actions brought in district courts of the United States; and

(2) the proper venue for a civil action shall be determined without regard to whether the action is local or transitory in nature.

(b) Venue in general.—A civil action may be brought in—

(1) a judicial district in which any defendant resides, if all defendants are residents of the State in which the district is located;

(2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated; or

(3) if there is no district in which an action may otherwise be brought as provided in this section, any judicial district in which any defendant is subject to the court's personal jurisdiction with respect to such action.

(c) Residency.—For all venue purposes—

(1) a natural person, including an alien lawfully admitted for permanent residence in the United States, shall be deemed to reside in the judicial district in which that person is domiciled;

(2) an entity with the capacity to sue and be sued in its common name under applicable law, whether or not incorporated, shall be deemed to reside, if a defendant, in any judicial district in which such defendant is subject to the court's personal jurisdiction with respect to the civil action in question and, if a plaintiff, only in the judicial district in which

it maintains its principal place of business; and

(3) a defendant not resident in the United States may be sued in any judicial district, and the joinder of such a defendant shall be disregarded in determining where the action may be brought with respect to other defendants.

* * * * *

§ 1400. Patents and copyrights, mask works, and designs.

(a) Civil actions, suits, or proceedings arising under any Act of Congress relating to copyrights or exclusive rights in mask works or designs may be instituted in the district in which the defendant or his agent resides or may be found.

(b) Any civil action for patent infringement may be brought in the judicial district where the defendant resides, or where the defendant has committed acts of infringement and has a regular and established place of business.

2. The version of 28 U.S.C. § 1391 in effect following the Judicial Improvements and Access to Justice Act of 1988, Pub. L. No. 100-702, § 1013, 102 Stat. 4642 (1988), provided in pertinent part:

§1391 (1988). Venue generally.

(a) A civil action wherein jurisdiction is founded only on diversity of citizenship may, except

as otherwise provided by law, be brought only in the judicial district where all plaintiffs or all defendants reside, or in which the claim arose.

(b) A civil action wherein jurisdiction is not founded solely on diversity of citizenship may be brought only in the judicial district where all defendants reside, or in which the claim arose, except as otherwise provided by law.

(c) For purposes of venue under this chapter, a defendant that is a corporation shall be deemed to reside in any judicial district in which it is subject to personal jurisdiction at the time the action is commenced. In a State which has more than one judicial district and in which a defendant that is a corporation is subject to personal jurisdiction at the time an action is commenced, such corporation shall be deemed to reside in any district in that State within which its contacts would be sufficient to subject it to personal jurisdiction if that district were a separate State, and, if there is no such district, the corporation shall be deemed to reside in the district within which it has the most significant contacts.

(d) An alien may be sued in any district.

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3. The version of 28 U.S.C. § 1391 in effect at the time of *Brunette Machine Works, Ltd. v. Kockum Indus., Inc.*, 406 U.S. 706 (1972), provided:

§ 1391 (1970). Venue generally.

(a) A civil action wherein jurisdiction is founded only on diversity of citizenship may, except as otherwise provided by law, be brought only in the judicial district where all plaintiffs or all defendants reside, or in which the claim arose.

(b) A civil action wherein jurisdiction is not founded solely on diversity of citizenship may be brought only in the judicial district where all defendants reside, or in which the claim arose, except as otherwise provided by law.

(c) A corporation may be sued in any judicial district in which it is incorporated or licensed to do business or is doing business, and such judicial district shall be regarded as the residence of such corporation for venue purposes.

(d) An alien may be sued in any district.

4. The version of 28 U.S.C. § 1391 in effect at the time of *Fourco Glass Co. v. Transmirra Prods.*, 353 U.S. 222 (1957), provided:

§ 1391 (1952). Venue generally.

(a) A civil action wherein jurisdiction is founded only on diversity of citizenship may, except

as otherwise provided by law, be brought only in the judicial district where all plaintiffs or all defendants reside.

(b) A civil action wherein jurisdiction is not founded solely on diversity of citizenship may be brought only in the judicial district where all defendants reside, except as otherwise provided by law.

(c) A corporation may be sued in any judicial district in which it is incorporated or licensed to do business or is doing business, and such judicial district shall be regarded as the residence of such corporation for venue purposes.

(d) An alien may be sued in any district.